

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICTORIA JIMINEZ)	
Claimant)	
VS.)	
)	Docket No. 141,809
BEECH AIRCRAFT)	
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	
Insurance Carrier)	

ORDER

Claimant appealed the Award of Administrative Law Judge John D. Clark dated December 28, 1994. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by her attorney, Kelly W. Johnston of Wichita, Kansas. Respondent, a self-insured, appeared by its attorney, David S. Wooding of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, David Shriver of McPherson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and stipulations set forth in the Award.

ISSUES

This matter came before the Administrative Law Judge on claimant's Application for Review and Modification pursuant to K.S.A. 44-528. The Administrative Law Judge denied claimant's request to modify the January 16, 1992 Award and claimant timely appealed requesting Appeals Board review of the single issue of whether claimant was entitled to a modification of the Award to a work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing arguments of the parties, the Appeals Board finds as follows:

The Award claimant asked the Administrative Law Judge to modify was entered on January 16, 1992, for a work-related accident that occurred on April 17, 1989. On that date, claimant injured her low back while working for the respondent. Respondent voluntarily provided medical treatment for the injury through Duane A. Murphy, M.D., an orthopedic surgeon in Wichita, Kansas. Dr. Murphy treated claimant conservatively with physical therapy and a back rehabilitation plan. Dr. Murphy returned claimant to work after one week to her regular job as a sheet metal worker. Dr. Murphy also placed permanent work restrictions on claimant of no lifting over 25 pounds and no repetitive bending or twisting. Dr. Murphy opined claimant had sustained a 10 percent permanent functional impairment as a result of the low back injury. Claimant also was examined by Dr. Robert A. Rawcliffe, Jr., an orthopedic surgeon in Wichita, Kansas, at the request of the respondent. After Dr. Rawcliffe's examination, he opined claimant's low back injury resulted in a 15 percent permanent functional impairment.

Although claimant had returned to her regular job as a sheet metal worker at a comparable wage for the respondent, claimant nevertheless argued that she was entitled to a work disability. Claimant acknowledged that the no work disability presumption contained in K.S.A. 1988 Supp. 44-510d did apply. However, claimant asserted she had overcome the no work disability presumption by presenting the testimony of vocational rehabilitation expert, James Molski. The Administrative Law Judge found claimant was not eligible for a work disability. He applied the no work disability presumption and found the evidence presented by the claimant had not overcome the presumption because claimant was only off work for one week; no surgical intervention was required; and all treatment was of a conservative nature. Accordingly, the Administrative Law Judge limited claimant's permanent partial disability benefits to functional impairment. See K.S.A. 1988 Supp. 44-510d. The Administrative Law Judge averaged Dr. Murphy's 10 percent functional impairment rating with Dr. Rawcliffe's 15 percent rating to arrive at an award of 12.5 percent permanent partial disability benefits based on functional impairment.

Since the original award was entered, claimant continued working as a sheet metal worker for the respondent until she left work on January 12, 1993, to have surgery performed for a work-related injury to her left wrist. Dr. George Lucas performed the surgery and claimant remained under his care until she was released on January 3, 1994.

Earlier, Dr. Lucas had released claimant to return to work in September and November 1993 with permanent restrictions to her left hand of no lifting more than 15 pounds and no twisting or grasping. On each of those occasions, claimant took the release to the respondent who informed her that there was no work available for her within those restrictions. Claimant received temporary total weekly disability payments until she was released from Dr. Lucas' medical care on January 3, 1994. Thereafter, on January 31, 1994, having reached the age of 65, claimant voluntarily retired from respondent's employment.

For a workers compensation award to be reviewed and modified, there has to be a change in the condition of the claimant and the party asserting such change has the burden of proving the change. See Gile v. Associated Co., 223 Kan. 739, 740-741, 576 P.2d 663 (1978). In the instant case, the claimant argued that she was now eligible for a work disability because she was no longer earning a comparable wage. Therefore, the no work disability presumption did not apply. In support of claimant's position, she cites the case of Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995), that held an injured claimant who had been returned to work at a comparable wage and thereafter laid off for economic reasons was then eligible for a work disability award after layoff because he was no longer earning a comparable wage. Claimant further asserted that even if her physical condition or functional impairment was not proven to have changed, her loss of her comparable wage job would, nevertheless, be sufficient to justify modifying the award to a work disability. Furthermore, claimant argued that her voluntary retirement did not preclude claimant from proving a work disability. See Brown v. City of Wichita, 17 Kan. App. 2d 72, 832 P.2d 365, rev. denied, 251 Kan. 937 (1992) and Lynch v. U.S.D. No. 480, 18 Kan. App. 2d 130, 850 P.2d 271 (1993).

Conversely, respondent argued against claimant's review and modification application asserting the claimant failed to present evidence that there was a change in claimant's low back injury that necessitated a modification of the Award. Respondent claimed that claimant's testimony and the testimony of her foreman, Ken Vaughn, was very clear that the only reason claimant had not been returned to work after her wrist surgery was because of the work restrictions placed on her by Dr. Lucas as a result of her left hand surgery and not as a result of a change in her low back condition. Prior to that surgery, claimant was able to satisfactorily perform her job duties. Respondent concluded that claimant's left wrist injury, a scheduled injury set forth in K.S.A. 1988 Supp. 510d, limited the claimant to permanent partial disability benefits not to exceed the number of weeks allowed in the schedule. The Administrative Law Judge denied claimant's request to modify the subject Award finding that claimant had not sustained her burden of proving she had suffered a work disability because of a change in her low back condition. The Administrative Law Judge reasoned the record established claimant was no longer able to work for the respondent because of her wrist, a scheduled injury, and not because of a change in her low back condition.

The Appeals Board agrees with the arguments of the respondent and with the award

of the Administrative Law Judge which denied claimant's request to modify the January 16, 1992 Award from permanent partial disability benefits based on functional impairment to a work disability. The record as a whole fails to establish that claimant had a change in her low back condition that resulted in her being eligible for a work disability. The Appeals Board concludes that the only change claimant has had in her physical condition from the time the Award subject to review and modification was entered was the surgery to her left wrist. That surgery then resulted in additional work restrictions which respondent could not accommodate. Therefore, respondent was unable to employ the claimant who thereafter chose, because she could not return to work and she was 65 years of age, to voluntarily retire from respondent's employment. A scheduled injury cannot result in a work disability because permanent partial disability benefits are limited to the number of weeks contained in the schedule. See K.S.A. 1988 Supp. 44-510d.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark entered in this proceeding on December 28, 1994, that denied claimant's application for review and modification, should be, and is hereby affirmed.

All orders contained in the original Award dated January 16, 1992, remain in full force and effect.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be directly paid as follows:

Barber & Associates	
Transcript of Motion Hearing	\$261.95
 Ireland Court Reporting	
Deposition of Ken Vaughn	\$146.44

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority decision. Both Brown v. City of Wichita, 17 Kan. App. 2d 72, 832 P.2d 72, 832 P.2d 365, rev. denied, 251 Kan. 937 (1992), and Lynch v. U.S.D. No. 480, 18 Kan. App 2d 130, 850 P.2d 271 (1993), provide that voluntary retirement does not affect a worker's right to permanent partial general disability benefits. Therefore, despite claimant's retirement, the fact finder must consider both loss of ability to earn a comparable wage and loss of ability to perform work in the open labor market in order to determine claimant's disability. To do otherwise is error.

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
David S. Wooding, Wichita, KS
David Shriver, McPherson, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director